BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GARY S. ROBINSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 205,004
STONE MASONS INC.	)	
Respondent	)	
AND	)	
	)	
NORTHWESTERN NATIONAL CASUALTY	)	
Insurance Carrier	)	

ORDER

Respondent appeals from the Award of Administrative Law Judge Nelsonna Potts Barnes dated February 20, 1998. The Administrative Law Judge found that claimant had proven accidental injury arising out of and in the course of his employment with respondent, and awarded claimant a 28 percent permanent partial impairment of function to his left upper extremity at the shoulder. Oral argument was held on January 8, 1999, in Wichita, Kansas.

APPEARANCES

Claimant appeared by his attorney, Roger A. Riedmiller of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, James A. Cline of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board.

ISSUES

(1) Did claimant suffer accidental injury arising out of and in the course of his employment on the dates alleged?

(2) Is respondent entitled to a credit for claimant's preexisting functional impairment pursuant to K.S.A. 44-501(c)?

(3) Are the attachments to respondent's brief to the Appeals Board, marked as "Appendix A", properly a part of the record for evidentiary purposes, or can the Appeals Board take judicial notice of these workers' compensation documents?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Claimant alleges accidental injury on July 25, 1995, while passing a 5- or 10-gallon bucket of masonry mud up a scaffold to another worker. As claimant was bringing his arm back down, he felt a pop in his shoulder. Claimant advised his supervisor of the incident, and was assigned to light duty, driving an automatic forklift, using one hand. Claimant continued working for respondent, but his shoulder condition worsened. He originally went to Dr. George Lucas at the University of Kansas School of Medicine-Wichita for treatment. Dr. Lucas diagnosed a history of shoulder dislocation, and noticed scars consistent with surgeries on both shoulders. Claimant acknowledged having surgery on his left shoulder after an earlier December 1984 dislocation. In addition, he had had surgery on his right shoulder and neck after being shot with a shotgun earlier in Springfield, Missouri. The right shoulder is not involved in this litigation.

Claimant ultimately came under the treatment of Dr. Chris Miller, an orthopedic surgeon in Wichita, Kansas. Dr. Miller first saw claimant on December 20, 1995, at which time he diagnosed left shoulder anterior instability. He recommended an arthroscopy, and ultimately performed an anterior reconstruction on the left shoulder. Claimant continued experiencing difficulties, advising the doctor that he felt like his shoulder slipped out of place on a couple of occasions. Dr. Miller felt that this was an indication that the reconstructive surgery was failing. Claimant continued in physical therapy and underwent a second arthroscopy of the shoulder in September 1996, at which time they discovered his shoulder had stretched out. Another reconstruction at that time tightened up the front of the shoulder.

Dr. Miller ultimately released claimant from his care, assigning claimant a 28 percent impairment of function to the shoulder, pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised).

Respondent denies claimant suffered accidental injury on the date alleged, arguing that claimant's shoulder condition occurred either from a 1984 injury, after which claimant had his previous surgery, or an incident in 1994, when claimant was wrestling with his brother and dislocated his shoulder.

While claimant acknowledges the 1984 incident, he denies having additional problems after the 1985 surgery. Claimant did admit that he received a workers' compensation settlement as a result of the 1984 injury suffered while working for a tire company. He received a 20 percent impairment to his shoulder. Claimant acknowledged the 20 percent settlement in the preliminary hearing, but at the time of regular hearing, could no longer remember the basis of the settlement. There was no indication the AMA Guides was utilized to reach this impairment.

Claimant denies the 1994 wrestling incident. Although he admitted going to Riverside Hospital in 1994 with his sister, he could not remember why he went there. Claimant speculated he may have injured his shoulder while working on a car. However, the medical records of Dr. Miller and Dr. Lucas, and the Riverside Hospital emergency services outpatient records contain entries discussing claimant's wrestling match with his brother and that his shoulder had dislocated at that time.

There is substantial conflict in the record regarding what, if any, problems claimant may have had after this 1994 alleged incident. Dr. Miller's medical notes indicate claimant dislocated his shoulder on several occasions, perhaps as many as six or eight, after the 1994 wrestling incident. Claimant denies this, alleging that the multiple dislocations actually occurred after the July 1995 accident with respondent.

Dr. Miller testified that, once a shoulder dislocates, the ligament that keeps the shoulder reduced is usually torn and does not fully heal. He acknowledged that the work claimant performed for respondent aggravated the preexisting injury, but he was unable to say whether claimant would have had a problem had he not gone to work for Stone Masons. Claimant could have developed reoccurring instability with any number of activities. It does not necessarily require heavy work. Dr. Miller was asked whether the alleged October 1994 incident was significant. He answered that, when treating shoulder instability, you always look back to the initial dislocation which, by medical history, occurred in October 1994, either while claimant was working with a tire or wrestling with his brother. He opined that it is possible the 1994 incident reinjured claimant's shoulder and started the current episode of shoulder problems, which led to the July 1995 injury when claimant's shoulder popped out at work. He acknowledged, however, that the work injury was a definite aggravation of claimant's preexisting condition. He also speculated that, if claimant had not participated in the heavy labor, he may never have had a dislocation problem again.

Dr. Miller was asked to separate his functional impairment between the 1994 injury and the 1995 injury with respondent. He testified he was unable to do so, as he had not had the opportunity to examine claimant prior to the 1995 incident. He was unwilling to speculate as to what percentage of impairment preexisted the 1995 work-related injury. He was willing to say that the impairment was, to a large part, caused by the aggravation at work while doing the stone mason's job. But again he was unwilling to designate any percentage of impairment between the 1994 and 1995 injuries.

He was asked, on cross-examination, what part the 1984 injury played in claimant's current situation. He stated that if claimant had done well, after the initial 1984 surgery, for 10 years, then he saw no connection. He felt the 1994 incident was what set the ball rolling, leading up to the 1995 aggravation.

CONCLUSIONS OF LAW

In proceedings under the Workers Compensation Act, the burden of proof shall be on claimant to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. *See* K.S.A. 44-501 and K.S.A. 1995 Supp. 44-508(g).

It is the function of the trier of facts to decide which testimony is more accurate and/or credible, and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case, and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

The Appeals Board finds that claimant has proven accidental injury arising out of and in the course of his employment on the date alleged. Respondent does not deny that the incident with the bucket occurred, and that claimant talked to Mr. John Born, the president of respondent Stone Masons, shortly after the incident. Mr. Born testified, however, that claimant had had ongoing shoulder problems for some time, and had even missed work before July 25, 1995, because of his reoccurring shoulder problems. He also acknowledged that claimant returned to work, performing a lighter forklift-driving job after the incident. However, this was short-lived and, after claimant got into an argument with the foreman about a non-work-related subject, claimant was fired.

Mr. Born also recalls claimant discussing with him the wrestling incident involving claimant and his brother. Claimant apparently took time off work after that incident, and actually switched jobs to Plastic Manufacturing so he could do an indoor job during the winter. He was then re-employed by respondent in the spring. Mr. Born acknowledged claimant had been a good employee in the past, although he did discuss certain

attendance problems claimant had displayed in the past. Some of these he related to claimant's ongoing shoulder problems.

While it is acknowledged there are discrepancies in claimant's story, it is also acknowledged that claimant suffered an injury on July 25, 1995, reported it to his employer shortly thereafter, and received treatment as a result of that injury. Dr. Miller, the only health care provider to testify in this matter, clearly opined that claimant's 1995 work-related accident aggravated his preexisting condition. The Appeals Board, therefore, finds that claimant has proven accidental injury arising out of and in the course of his employment with respondent.

K.S.A. 44-501(c) states in part:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

Respondent's claim that claimant has a preexisting functional impairment involves not only the 1994 incident, but also claimant's 1984 work-related settlement. Claimant acknowledged, during the preliminary hearing, that he had a prior shoulder injury and was given a 20 percent impairment at the time of that settlement. However, claimant did not discuss any specifics of that shoulder injury or which particular area of the shoulder it involved. No medical evidence in the record can pinpoint which area of the shoulder was injured in 1994, what type of surgery was performed or how the 20 percent was reached.

Respondent attempts to bootleg into the record certain workers' compensation forms, alleging that judicial notice obligates the Appeals Board to take into consideration matters of public record from the offices of administrative bodies. Respondent cites several Supreme Court cases which support its position. However, respondent fails to support in its argument why the Appeals Board should consider evidence presented to the Appeals Board but not to the Administrative Law Judge. Even were judicial notice appropriate in this instance, it is still mandatory under K.S.A. 1995 Supp. 44-555c(a) that the review of the Board be "upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge." The evidence attached to respondent's brief was not presented to the Administrative Law Judge, and will not be considered by the Appeals Board. This renders moot respondent's argument that the Appeals Board is obligated to take judicial notice of the evidence.

During Dr. Miller's deposition, respondent attempted to elicit testimony regarding claimant's preexisting functional impairment. Dr. Miller opined that, as claimant had surgery in 1994, but apparently suffered no lasting consequences, having no ongoing

limitations for approximately 10 years, he could not speculate as to what functional impairment resulted from that injury. In addition, Dr. Miller refused to provide an opinion regarding what functional impairment may have resulted from either the tire or wrestling 1994 incidents. Dr. Miller testified that, if he had had the opportunity to examine claimant prior to the 1995 work-related injury, he would have been able to provide such an opinion, but that opportunity was not made available to him.

The Appeals Board, therefore, finds that, while respondent would be entitled to a reduction of the preexisting functional impairment had one been proven, respondent has failed to show what, if any, percentage of functional impairment preexisted claimant's July 25, 1995, accident, and therefore, no reduction can be allowed in this instance.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated February 20, 1998, should be, and is hereby, affirmed, and claimant is granted an award for a 28 percent permanent partial disability at the shoulder.

IT IS SO ORDERED.

Dated this ____ day of April 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Wichita, KS
James A. Cline, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director